

another piece of “junk mail,”³⁵⁰ and recommended that the Rule be amended to specifically require that any confirmation document sent pursuant to this method of authorization be clearly and conspicuously labeled as such.³⁵¹ NAAG also suggested that, if reinstated, the written confirmation method should not be considered a “verifiable” means of obtaining consumers’ authorization in circumstances when the consumer is already vulnerable, such as when the goods or services to be paid for are offered in conjunction with a “free-to-pay conversion” or “negative option feature,” or when the seller or telemarketer has preacquired account information prior to the initiation of the call.³⁵² MPA suggested that perhaps this method could be reinstated if used in the sale of goods or services for which a liberal refund policy exists.³⁵³ NAAG raised the concern that there might exist a material inconsistency between the disclosures made in the sales portion of the call and those sent as part of a post-call confirmation.³⁵⁴

In response to this range of comment, the Commission has decided to reinstate the written confirmation method of obtaining express verifiable authorization, with certain modifications. After balancing the concerns enunciated by consumer groups against industry’s strongly-stated desire to reinstate this economical means of obtaining express verifiable authorization, the Commission has determined to modify the provision to enhance the likelihood that consumers will receive these written confirmations in a timely manner and will recognize the confirmations as important documents that should not be thrown away unopened. The amended Rule continues to require that the written confirmation disclose all of the information contained in § 310.3(a)(3)(ii)(A)-(G), as well as a statement of the procedures by which the customer can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate. However, the amended Rule requires that the written confirmation be “clearly and conspicuously labeled” as such, on the outside of the envelope in which it is sent, and that it be sent to the customer

by first class mail³⁵⁵ prior to the submission for payment of the customer’s or donor’s billing information.³⁵⁶ The Commission will continue to monitor the use of the post-sale written confirmation method of express verifiable authorization and may revisit this issue in a subsequent Rule Review should circumstances warrant.

The amended Rule also proscribes the use of the post-sale method of authorization when the goods or services that are the subject of the transaction are offered in conjunction with a “free-to-pay conversion” feature and preacquired account information. The record is replete with evidence, detailed in the section below discussing new § 310.4(a)(6), that “free-to-pay conversion” offers, particularly when coupled with the use of preacquired account information, have often resulted in unauthorized charges to consumers.³⁵⁷ Given this evidence, coupled with NAAG’s observation that “[a] consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently ‘declined,’”³⁵⁸ the Commission will require that authorization in such situations must be obtained pursuant to either § 310.3(a)(3)(i) or (ii).

§ 310.3(a)(4) — Prohibition of false and misleading statements to induce the purchase of goods or services or a charitable contribution

The only proposed modification of this provision in the NPRM was to expand it, pursuant to the mandate of the USA PATRIOT Act, to encompass misrepresentations made to induce a charitable contribution.³⁵⁹ The

Commission received few comments on this section, and none opposing this proposed expansion.³⁶⁰ Therefore, the Commission adopts the wording of proposed § 310.3(a)(4) unchanged in the amended Rule.

§ 310.3(b) — Assisting and facilitating

Section 310.3(b) of the original Rule prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. During the Rule Review, the Commission received comments from consumer protection and law enforcement groups who argued that the “conscious avoidance” standard adopted in the original Rule should be modified to a “knew or should have known standard.”³⁶¹ The Commission noted that it continued to support the “conscious avoidance” standard, believing that such a standard is appropriate “in a situation where a person’s liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person.”³⁶² Although the provision was retained in the proposed Rule without amendment, its coverage was expanded to cover assisting and facilitating in the solicitation of charitable contributions pursuant to the USA PATRIOT Act. The Commission invited additional comment on, and proposed alternatives to, the assisting and facilitating standard.³⁶³

In response to the NPRM, VISA noted that although this provision was retained unchanged in the proposed Rule, “the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities.”³⁶⁴ The Commission believes that the modifications to the preacquired account telemarketing provisions in the amended Rule obviate the concerns expressed by VISA.³⁶⁵

ARDA expressed its support for retaining the “conscious avoidance” standard, endorsing the rationale

³⁵⁰ *Id.* (noting that such confirmations “tend to go unnoticed or unrecognized by consumers, thereby failing in their function of ‘authorizing’ a payment”).

³⁵¹ *Id.*

³⁵² See June 2002 Tr. III at 42-43 (NAAG).

³⁵³ *Id.* at 44 (MPA).

³⁵⁴ *Id.* at 48-49 (NAAG).

³⁵⁵ The requirement that such confirmations be sent via first class mail should cause industry to incur no additional expense. According to the DMA representative at the June 2002 Forum, federal postal regulations require that such confirmations be sent via first class mail. See June 2002 Tr. III at 45; see also June 2002 Tr. III at 47 (CCC) (noting that company practice is to ensure that written confirmations are clearly and conspicuously labeled). This change to the Rule, then, will merely echo the postal regulations, which require that personalized business correspondence be sent via first class mail. See 39 CFR 3001.68, App. A.

³⁵⁶ The Commission has declined, at this time, to follow the suggestion by Capital One that the written confirmation method should be reinstated, “provided that the confirmation is delivered 30 days prior to submission for payment, and the customer is permitted to repudiate the sale within that time by calling a toll-free number,” because the record provides too little evidence to suggest that these additional protections are necessary to prevent consumer injury. See Capital One-NPRM at 8.

³⁵⁷ See discussion of amended Rule § 310.4(a)(6), below. See also June 2002 Tr. III at 42-43 (NAAG).

³⁵⁸ NAAG-NPRM at 49.

³⁵⁹ Proposed Rule § 310.3(a)(4). See 67 FR 4508.

³⁶⁰ See, e.g., Make-A-Wish-NPRM, *passim* (detailing complaints received by Make-A-Wish, which does not solicit donations by telephone, regarding fraudulent telemarketers claiming or implying that they are calling from or affiliated with Make-A-Wish).

³⁶¹ See 67 FR at 4508-09.

³⁶² *Id.* at 4509.

³⁶³ *Id.*

³⁶⁴ VISA-NPRM at 12.

³⁶⁵ See discussion of amended Rule §§ 310.4(a)(5) and (6) below.